16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

—v.—

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PROFESSORS CYNTHIA L. ESTLUND, SAMUEL ESTREICHER, JULIUS G. GETMAN, WILLIAM B. GOULD IV, MICHAEL C. HARPER, AND THEODORE J. ST. ANTOINE, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are leading professors of labor and employment law who have written and lectured extensively about the role of labor organizations and collective bargaining, both in government offices and private companies, in the United States and abroad. A focus of their work has been the importance of independent employee organization to the positive contributions that unions and collective agreements can make to our democratic society. Short biographies of each of the *amici* follow:

Cynthia Estlund is the Catherine A. Rein Professor of Law at New York University School of Law. She has taught and lectured around the world and has authored and edited several books and scores of articles and book chapters in the fields of labor law and employment law.

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or submission of this brief, and no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioners' and respondents' letters consenting to the filing of all *amicus* briefs are on file with the Clerk's office.

Restatement of Employment, and was a clerk to Justice Lewis F. Powell, Jr.

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William B. Gould IV is the Charles A. Beardsley Professor of Law, Emeritus at Stanford University. A member of the National Academy of Arbitrators since 1970 and recipient of five honorary degrees, he is the author of ten books and numerous articles. He has served as Chairman of the National Labor Relations Board and as Chairman of the State of California's Agricultural Labor Relations Board.

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Theodore J. St. Antoine is the Degan Professor Emeritus of Law at the University of Michigan and former Dean of the Michigan Law School. He is a past president of the National Academy of Arbitrators and a former secretary of the ABA Labor and Employment Law Section. He has also taught at Cambridge, Duke, George Washington, Illinois, and Tokyo universities, as well as the Salzburg Seminar in American Studies. In addition to numerous articles and book chapters, he has co-edited a major casebook

on labor law, now in its twelfth edition, and edited the NAA's textbook on arbitration.

SUMMARY OF ARGUMENT

The issue in this case reflects a fundamental dynamic as to how the government as employer will manage its workforce. The government employer here is not regulating what its employees can say or do in a public arena, but rather is acting as manager of its employees. The challenge for the public employer is how to obtain the most dedicated, effective performance from its staff consistent with budgetary and other constraints.

The public employer must establish fair policies with uniform criteria to accomplish that goal. Employees working in the same location expect to be evaluated and compensated by a uniform system—not necessarily identical terms but a set common criteria that is uniformly applied. If the employees are judged by different norms and expectations, or if ostensibly uniform rules are applied in a disparate manner, this will sow dissension and undermine their ability to serve fully the government agency's mission.

The public employer knows that it has to establish uniform criteria for setting wages, hours, health and welfare benefits, and other terms of employment and provide for uniform application of those criteria. There are essentially two tenable approaches open to the public employer for deriving those criteria and applying them in particular cases. One is by unilateral management action, with the assistance of its human resources personnel and perhaps in consultation with other employees or outside consultants. The other is by collective bargaining with

the exclusive bargaining representative of its employees. The collective-bargaining route has the advantage of providing an independent employee voice likely to reveal employee preferences and concerns that management might not be able to elicit on its own and to ensure that those preferences and concerns are effectively heard during bargaining and in the grievance procedure.

The contribution to employee voice that collective bargaining with an exclusive bargaining representative affords also promotes First Amendment values in a government personnel-management context largely excluded from direct constitutional scrutiny under this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

If the collective-bargaining route is truly to provide an independent employee voice, the affected employees must fund their own representative. Otherwise, that representative, however well-intentioned it may be, will be reasonably viewed by the staff as an agent of management and, when staff interests are at variance with management's, will not be able in most cases to advance the employees' perspective. This is a limitation common, in the absence of collective bargaining, to most personnel and human resources departments in both government offices and private companies.

The self-funding critical to the exclusive bargaining representative's independence and effectiveness requires that all employees who benefit directly from that representation pay their fair share of its costs. Consistent with its role in the employer's process of setting common terms of employment for similarly-situated employees and its statutory duty to represent

fairly all represented employees, whether they are union members or not, the exclusive bargaining representative cannot in most instances confine the benefits of its representation to those willing to assume its costs. If, then, employees can enjoy the benefits of representation without paying for it, there will over time be less effective representation provided by the exclusive representative or none at all.

Where the state permits employees to engage in collective bargaining through independent exclusive representatives of their choosing, it is consistent with good management practice and First Amendment values that such organizations be self-funded through dues or fees required of all employees in the bargaining unit as a condition of employment.

ARGUMENT

THE GOVERNMENT AS EMPLOYER ACTS CONSISTENTLY WITH THE FIRST AMENDMENT WHEN, IN LIEU OF EXERCISING ITS RIGHT TO UNILATERALLY SET THE CONTRACTUAL TERMS OF EMPLOYMENT FOR ITS EMPLOYEES, IT PROVIDES THAT THE EMPLOYEES MAY FORM OR SELECT AN EXCLUSIVE BARGAINING REPRESENTATIVE TO ACT ON THEIR BEHALF IN NEGOTIATING WITH THE EMPLOYER AN ENFORCEABLE AGREEMENT SETTING THEIR EMPLOYMENT TERMS (AND ADMINISTERING SUCH AGREEMENT) AND REQUIRES ALL EMPLOYEES WHO DIRECTLY BENEFIT FROM SUCH REPRESENTATION TO PAY A FAIR SHARE OF THE COSTS.

A. An Employer of Any Size Must, as a Matter of Practical Necessity, Set Common Criteria, Schedules or Algorithms ("Common Terms") for the Wages and Health and Welfare Benefits to Be Paid to Its Similarly-Situated Employees, the Hours of Work, and the Workplace Rules (Including a Grievance Procedure) That Apply to Those Employees.

For employers of any size and for most of their employees, the terms and conditions of employment for similarly-situated employees are set through uniform criteria, schedules, or algorithms (hereafter, "common terms") that, in principle, are to be uniformly applied. This is because compensation and employment terms are important motivators of performance, especially when, as in the case of many

government services, the quality of performance cannot be easily measured or monitored; and because employees care a great deal about whether they are being treated fairly in comparison with other employees with the same or similar qualifications doing the same or similar work. When employers violate employee expectations of horizontal equity (*i.e.*, treating similarly-situated employees alike), they invite employee dissension and undermine overall performance.

In the public sector or the private sector, "[w]hen an employer is dealing with a large number of similarly situated employees, the employer is likely to [set and then] communicate the terms of the employment relationship through unilateral statements" of employer policy that "apply uniformly to [such] employees without further negotiation with individual employees." Amer. Law Instit., Restatement of Employment Law, Comment a to §2.05 (2015). Such employers rarely, if ever, negotiate individual contacts with any of their similarly-situated employees because terms agreed to with any individual employee would, as a practical matter, have to be extended to the rest of the employer's similarly-situated employees.[2]

When employees have selected an exclusive bargaining representative with whom the employer

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[2] This is also a widely-held premise of economists when evaluating whether employers have market power over terms and conditions of employment (technically referred to as employer "monopsony"): "When the employer cannot offer different wages to different workers depending upon their location, a firm that wishes to be hire more labor must not only offer higher wages to attract new employees, but also pay existing employees the same higher wage." V. Bhasjarm, Alan Manning & Ted To, Oligopsony and Monopsonistic Competition in Labor Markets, 16 J. of Econ. Persp. 155, 162 (Spring 2002).

must negotiate, the terms of any resulting collective agreement are also likely to reflect this emphasis on uniform criteria and uniform application. "The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944). As with trade agreements, the terms of employment are uniform. Except as restricted by the collective agreement or external law, the [employees'] employment terms "already have been traded out. There is little left to individual agreement except the act of hiring." *Id.*

Not all of the employees in the bargaining units at issue in this litigation are identical in their hopes and desires to the Rhode Island factory workers of *J.I. Case* but they, too, reasonably expect to be compensated and evaluated according to the same criteria as other employees in their work location with the same experience and length of service.[3]

B. The Government as Employer Has Only Two Tenable Means for Setting Common Terms of Employment: Either Setting Those Terms Unilaterally Or, Instead, Setting Them, Within Statutory Limits, in Bargaining With the Exclusive Bargaining Representative of the Employees' Choosing.

Public sector employers are certainly aware of the need to maintain uniform criteria in setting employment terms for similarly-situated employees. The challenge for the government employer in establishing terms for similiarly-situated employees is figuring out how much weight to give to experience

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[3] On the union's statutory duty of fair representation, see note 10 and pages 16-17 *infra*.

and length of service in pay and promotion decisions, how to measure performance, and how to develop evaluation procedures and instruments employees can have confidence in and that will help them to become more effective in their work locations. And once these rules and criteria are formulated, the further question is how to provide integrity to internal grievance and other complaint procedures so that employees are willing to come forward to reveal their needs and concerns without fear of reprisal (thus enabling site-based management to be proactive before disputes unravel out of control).

The government as employer has only two tenable means of setting common terms of employment for similarly-situated employees: (1) unilateral management action or (2) collective bargaining with an exclusive bargaining representative. Unilateral management can be quite sophisticated if the government agency has the necessary resources. A good human resources department should be attentive to employee preferences (say, with respect to health and welfare benefits) and be viewed by most employees as receptive to certain complaints about supervisors so that potentially serious supervisor abuse of authority can be "nipped in the bud". Again, if the resources are there, public management can supplement its human resources personnel by retaining outside consultants to poll the workforce on pay and benefits issues and advise management of the best practices used in comparable employment settings.

Not all public managers are so well-resourced but even if they were, there are limits to the benefits of most forms of unilateral management. Recognizing as much, some states, including Illinois, experimented initially with public employee groups that would "meet and confer" with the public employer. These groups

were members-only voluntary organizations. They did not have exclusive authority to represent all similarly-situated employees. The public employer, moreover, owed no duty to bargain with the organizations, and no binding employer-employee group agreement eventuated. The end result was perhaps a better informed but still unilateral employer determination of the terms and conditions of employment.

A good number of states that began with this "meet and confer" model changed their laws, as did Illinois, to allow a public employee organization representing a majority of the employees in an "appropriate bargaining unit" to become the statutory exclusive bargaining representative for all of the employees in the unit. To some extent this was due to public-employee dissatisfaction with the limitations of a "meet and confer" model that, at the end of the day, did not alter the reality that common terms of employment would be set unilaterally by the public employer.

It was also due to a strong management preference that developed after the emergence of employee interest in organization for "a single representative" to "avoid[] the confusion that would result from attempts to enforce two or more agreements specifying different terms and conditions of employment," to "prevent[] inter-union rivalries from creating dissension within the work-force," and to "free[] the employer from the possibility of facing conflicting demands from different unions...." *Abood v. Detroit Board of Education*, 431 U.S. 209, 220-21 (1977), citing, *inter alia*, *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (employees held not protected in using pressure tactics to compel employer to deal with them rather than the exclusive bargaining representative). *See* 74th Cong., 1st Sess., S. Rep. No. 573 (May 1, 1935), reprinted in National Labor Relations Board, 2

Leg. History of the National Labor Relations Act, 1935 (1985), pp. 2300, 2313 ("Since it is wellnigh universally recognized that is it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule.... Employers..., where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority rather than numerous warring factions.").

Thus, the functional logic of the situation was that if there was to be a serious role for employee input in the setting of terms of employment, the public employer would recognize the organization supported by the majority of employees as the exclusive bargaining representative with authority to negotiate, within statutory limits,[4] a single enforceable collective agreement for all similarly-situated employees.

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[4] State law defines the scope of mandatory collective bargaining. Under the Illinois statute challenged here, 5 Ill. Comp. Stat. 315/4, the public employer "shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees." *Id.* The employer's bargaining obligation does extend "to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives...." *Id.*

C. Collective Bargaining with an Exclusive Bargaining Representative Presents Significant Advantages Over Its Alternatives by Providing the Opportunity for an Independent Employee Voice in an Employment-Terms Setting Process that Results in an Enforceable Agreement and is Consistent with First Amendment Values.

A distinct advantage of the collective-bargaining approach to setting wages, hours, and working conditions is that the employer gains the benefits of hearing an independent employee voice able to elicit employees' preferences and concerns that individual employees may be reluctant to share with the employer or its human resources personnel. In many nonunion employment dispute systems, employees are not likely to raise claims while employed because they fear employer reprisal.[5] It is thus not surprising that nearly all law suits under federal and state antidiscrimination laws (with the exception of certain systemic hiring and promotion challenges) involve terminations from employment rather than complaints from incumbent employees.

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[5] As a classic work on collective bargaining's effect on management found: "It is extremely difficult for management to operate a grievance procedure effectively in nonunion plants. In these plants a few individuals may voice complaints or suggest changes, but in general the employees are not heard from, and their complaints rarely go beyond the foreman. ... Trade unions change all this. They give the workers machinery for presenting complaints to management, and they protect workers who make complaints from being victimized." Sumner H. Slichter, James J. Healy & E. Robert Livernash, *The Impact of Collective Bargaining on Management* 692-693 (Brookings Instit. 1960).

Where an exclusive employee bargaining representative is present, incumbent employees are more likely to utilize the mechanism of "voice" rather than "exit"[6] Turnover is lower and utilization of complaint procedures higher when employees have the support of other employees through the exclusive bargaining representative.[7]

The presence of an independent employee voice in public sector offices also has implications for free speech values as well as effective workplace management. Even if the First Amendment does not protect government employees in their professional, job-related speech, it is important that employees feel they can raise workplace concerns with their employer without fear of reprisal, can turn to an independent employee representative to escalate the grievance with higher levels of management, and if necessary, take the matter to binding arbitration. As this Court noted in *Garcetti*, a good internal system can help resolve grievances without a potentially disruptive public airing of personnel disputes: "[a] public employer that wishes to encourage employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism." 547 U.S. at 424. Similarly, the disputes in *Connick v. Meyers*, 461 U.S. 138 (1983) and *Waters v. Churchill*, 511 U.S. 661 (1994), might have been resolved without litigation if the employees had recourse to an effective internal procedure negotiated

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[6] The terminology is taken from Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States (1970).

[7] This is a principal finding of Richard B. Freeman & James L. Medoff, What Do Unions Do? (1984), which has generated an extensive literature.

and administered by an exclusive bargaining representative.

D. Having Employees Themselves Finance the Exclusive Bargaining Representative Provides a Level of Independent Voice Valuable to Achieving the Ends of the Collective-Bargaining Process and is Consistent with First Amendment Values

For an exclusive bargaining representative to be able to fulfill its role as an independent employee voice able to raise with the employer employees' preferences and concerns that otherwise they may be reluctant to express to their supervisors, the employee organization must be able to finance itself through employee dues and fees. If the representative were to be funded by the school board,[8] it would in short order be reasonably viewed by the employees as an organ of management, a human resources department of the government employer in all but name.[9]

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[8] For private employers governed by the NLRA, such payments would violate the civil and criminal provisions of §302(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(a). Cf. *Caterpillar, Inc. v. International Union, UAW*, cert. dismissed, 523 U.S. 1015 (1998).

[9] This is illustrated by the history of employer-dominated labor organizations between the enactment of the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933), and the enactment of the NLRA in 1935, which in § 8(a)(2), 29 U.S.C. § 158(a)(2), effectively outlawed such organizations. *See generally* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of § 8(a)(2) of the NLRA*, 69 N.Y.U.L.Rev. 125 (1994).

E. The Government as Employer Acts Properly in Requiring All Employees Who Directly Benefit from the Exclusive Bargaining Representative's Performance of Its Collective-Negotiation and Grievance-Adjustment Functions to Pay Their "Fair Share" of the Costs of Such Representation.

It is the price of democratic government that citizens may have to allow their taxes to be used to finance activities and expression by the government that they personally may not favor or even oppose. This Court's "cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objections of some members of the group." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 472-473 (1997). Governance of our society is based on majority rule,[10] with constitutional limits to protect civil liberties. If citizens could readily opt of paying taxes for, say, police protection by local government because they prefer private provision of security services, the municipality would have considerable difficulty maintaining an effective local police force. Similarly, if

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[10] Although most represented employees would favor higher wages over lower levels of compensation, protection from layoff keyed to length of service in lieu of management discretion, and lower contributions for employee benefits than higher ones, "differences" can arise among represented employees "in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). These are most often resolved here, as in the larger society, through the majority-rule principle. Indeed, represented employees have additional recourse to the union's duty of representation which requires that the union's conduct stays within "[a] wide range of reasonableness ... subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Id.*

citizens could opt out of paying taxes for public schools—perhaps because they are homeowners who no longer have children in the public schools or are ideologically opposed to public provision of education—public education would suffer because the level of funding would decline significantly. Depending on the varying objections of the citizenry, the funding base for public services would be undermined with inevitably negative effects on the provision of those services.[11]

Certainly, there would be no First Amendment concern (putting aside questions about legality and the union's indpendence) if the government directly funded employee organizations to do precisely what the union respondents have said or done in this case in connection with their collective-negotiation and grievance-adjustment activities. Cf. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). The constitutional issue does not change because the government as employer has chosen to capture the benefits of an independent employee voice in the setting of common terms for their similarly-situated employees, which requires that employees pay their fair share of costs of such representation.

What the exclusive bargaining representative does in collective bargaining involves the provision of collective goods available to all in the bargaining unit. Because of the functional necessity of setting common terms of employment for similarly-situated employees and because of the exclusive bargaining representative's

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[11] As this Court stated in *United States v. Lee*, 455 U.S. 252, 260 (1982), addressing the religious objections of a farmer belonging to the Old Order Amish against payment of social security taxes, "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violated their religious beliefs."

statutory duty to "represent the interests of all public employees in the unit," 5 Ill. Comp. Stat. 315/6(d), the benefits the exclusive representative obtains in the collective agreement and its administation cannot be confined to employees willing to pay the costs of representation. This is certainly true of negotiated health and welfare benefits which, simply in order to take advantage of economies of scale, are available to all employees (sometimes with exceptions for certain probationary or temporary employees). The negotiated criteria and procedures for determining additional compensation, promotion, and employee evaluation also cannot, as a practical and legal matter, be limited to those willing to pay.

The negotiated grievance procedure, too, is a collective good, even though individual employees have a statutory right to present their grievances directly to the employer (as long as the adjustment reached is not inconsistent with the collective agreement, and the exclusive representative is given the opportunity to be present at any conference with the employee). *See* Ill. Comp. Stat. 315/6 (b). This Court has recognized the importance in private-sector companies of unions being able to control whether grievances are escalated to higher-level management and whether cases will be submitted to arbitration. Although unions cannot, consistent with their duty of fair representation, "arbitrarily ignore a meritorious grievance or process it in a perfunctory manner," *Vaca v. Sipes*, 386 U.S. 171, 191 (1967), there is no individual employee right to escalate a grievance or arbitrate a dispute under a collective agreement. The union and the employer typically have negotiated a procedure whereby "both sides are assured that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can

be isolated and resolved." *Id.* Both in the public sector as well as the private sector, the union is the employees' custodian of the collective agreement, acting as the "statutory agent and ... coauthor of the bargaining agreement in the enforcement of that agreement." *Id.*[12]

In the end, "[c]ollective bargaining, war, and the basic government services are alike in that the 'benefits' of all three go to everyone in the relevant group, whether or not he has supported the union, served in the military, or paid the taxes. Compulsion is involved in all three, and has to be." Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 90 (1977 ed.). The question is not one of "individual freedom" but whether "the results of the unions' activities justify the power [Illinois] has given them." *Id.* at 88. Here, the State has made the decision—that it is free to change at any time—that its government agencies should engage in collective bargaining with their employees' exclusive bargaining representative with respect to their wages, hours, and working conditions.[13]

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[12] For similar reasons, when the represented employee invokes his or her rights under the collective bargaining agreement, or seeks the aid of the exclusive bargaining representative, the employee is necessarily engaged in protected "concerted" activity. *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[13] Petitioners attempt to equate respondents with advocacy organizations or interest groups that lobby for changes in legislation and public policy and may appear in court to advance causes that presumably benefit employees. The critical distinction is that these organizations, unlike respondents, are not engaged in the public employer's internal process of setting common terms of employment for similarly-situated employees. Petitioners' point can be likened to saying that lawyers should not be paid for representing public employees in court or an administrative agency because a number of advocacy groups are also working on the legislative and public-policy fronts to advance what they believe to be the interests of employees.

It is, at bottom, a political decision for Illinois and other States to make whether to elect or continue collective bargaining for their public employees or remain with or revert to some form of unilateral management. The merits of the decision should be considered in these terms and not in terms of an "individual freedom" to refuse to pay a fair share of the costs of the services of an exclusive bargaining representative while benefiting from those services.

Petitioner's request that this Court overrule *Abood* and its other decisions based on *Abood* should be denied.

CONCLUSION

The court of appeals judgment should be affirmed.

Respectfully submitted,

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